

A **RHB BANK BHD v. MALAYSIA PACIFIC CORPORATION BHD
& ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA

B MARY LIM JCA
[CIVIL APPEALS NO: W-02(IM)(NCVC)-1811-10-2016 &
W-02(IM)(NCC)-1812-10-2016]
30 JANUARY 2018

C **COMPANY LAW:** *Winding-up – Petition – Notice – Company defaulted in repayment of credit and overdraft facilities – Bank obtained summary judgment against company and issued winding-up notice for repayment of judgment sum – Whether company deemed unable to pay debt – Whether bank could issue winding-up notice – Whether notice valid and enforceable – Whether bank could proceed with winding up petition – Companies Act 1965, s. 218(2)*

D **CIVIL PROCEDURE:** *Injunction – Fortuna injunction – Company defaulted in repayment of credit and overdraft facilities – Bank obtained summary judgment against company and issued winding-up notice for repayment of judgment sum – Whether judgment debt compounded and secured – Whether company could apply for Fortuna injunction to restrain bank from presenting winding-up petition – Whether petition had chance of success if presented – Companies Act 1965, s. 218*

The appellant had granted credit and overdraft facilities to the respondent. When the respondent defaulted in its repayment, the appellant commenced a civil claim at the High Court and successfully obtained a summary judgment against the respondent. The judgment sum was for over RM112,212,565.24 with interest and costs ('the judgment sum'). The appellant then commenced foreclosure proceedings in respect of the respondent's property, together with the building constructed on it, which was charged by the respondent to the appellant. The High Court granted an order for sale of the property by way of a public auction. The appellant issued a notice pursuant to s. 218(2)(a) of the Companies Act 1965 ('the Act'), seeking payment of the judgment sum ('the s. 218 notice'). The respondent filed an originating summons ('the amended OS'), challenging the validity and enforceability of the s. 218 notice and seeking an injunction restraining the appellant from presenting a winding-up petition. The respondent further sought an interim *Fortuna* injunction, which was granted on an *ex parte* basis. In finding the notice not at all void or a nullity, the High Court Judge ('the HCJ') held that (i) the appellant had obtained a valid and enforceable judgment against the respondent; and (ii) where there was a failure to pay the sum demanded, under s. 218(2) of the Act, the respondent was deemed unable to pay its debt and therefore, winding-up proceedings

may be commenced against the respondent. Despite so finding, the HCJ granted the orders sought in the amended OS and the *Fortuna* injunction, principally on the basis that the judgment debt was compounded and secured, which meant that the appellant was not entitled to issue the s. 218 notice. It was the view of the HCJ that if the appellant was allowed to proceed with the winding-up petition, it would render the word 'to secure' in s. 218(2)(a) of the Act superfluous or otiose. Hence, the present appeals.

Held (allowing appeals)

Per Mary Lim JCA delivering the judgment of the court:

- (1) The notice was valid and enforceable. In alluding to s. 218 of the Act, both in its title caption and in the body of notice itself, where the statutory provision is more specifically identified as 'Section 218(2)(a) of the Companies Act 1965', the appellant had satisfied the requirements for a valid s. 218(2)(a) notice. The notice clearly described itself as a 'Statutory Demand Pursuant to Section 218 of the Companies Act 1965 (Act 125) for Payment of a Debt'. It alluded to the respondent's indebtedness for the various sums detailed. The debt for the various sums was obtained by the appellant against the respondent by way of the civil claim. This showed that the debt stipulated in the notice was a judgment debt. The respondent was given the requisite 21 days from the date of the service of the notice to pay the sum demanded. The appellant also alerted the respondent that the appellant claimed reliance on the statutory presumption in s. 218(2)(a) that the respondent would be deemed unable to pay its debt and the appellant may commence winding-up proceedings against the respondent. (paras 20 & 21)
- (2) There was a misdirection on the principles of the *Fortuna* injunction that were applicable. The HCJ accepted that the debt was founded on a judgment debt but agreed with the respondent that the debt was in *bona fide* dispute because the debt due and owing to the appellant was secured. The debt was neither secured nor compounded. It was therefore apparent that the respondent had not met the first principle for the grant of a *Fortuna* injunction. The contractual arrangements merely gave the appellant two corresponding causes of action in the event the respondent breached its obligations to repay the credit facilities provided by the appellant. Unless there was an agreement to the contrary, the appellant was entitled to pursue both or all remedies available against the respondent simultaneously, contemporaneously or successively to recover the monies lent. The respondent failed to show that in law, and on the facts, the petitions, if presented, had no chance of success and was bound to fail. On the contrary, the appellant had shown that it had every chance of success. (paras 22, 25, 26 & 35)

A ***Bahasa Malaysia Headnotes***

- Perayu telah memberi responden kemudahan kredit dan overdraf. Apabila responden ingkar dalam bayaran semula, perayu memulakan tindakan sivil di Mahkamah Tinggi dan berjaya memperoleh satu penghakiman ringkas terhadap responden. Jumlah penghakiman tersebut adalah sebanyak
- B RM112,212,565.24 dengan faedah dan kos ('jumlah penghakiman'). Perayu kemudian memulakan prosiding penyitaan terhadap hartanah responden, bersama-sama dengan bangunan yang terbina atasnya, yang dipajakkan oleh responden pada perayu. Mahkamah Tinggi membenarkan perintah jualan hartanah tersebut melalui lelongan awam. Perayu mengeluarkan notis bawah
- C s. 218(2)(a) Akta Syarikat 1965 ('Akta'), memohon bayaran jumlah penghakiman ('notis s. 218'). Responden memfailkan saman pemula ('SP terpinda'), mencabar kesahan dan kebolehuatkuasaan notis s. 218 dan memohon injuksi menghalang perayu mengemukakan petisyen penggulungan. Responden seterusnya memohon satu injuksi interim *Fortuna*, yang diberi
- D secara *ex parte*. Mendapati notis tidak sama sekali tidak sah atau terbatal, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) perayu telah memperoleh satu penghakiman yang sah dan boleh dikuatkuasakan terhadap responden; dan (ii) apabila berlaku kegagalan membayar jumlah yang dituntut, bawah
- E s. 218(2) Akta, responden dianggap tidak mampu membayar hutangnya dan berikutan itu, prosiding penggulungan boleh dimulakan terhadap responden. Walaupun berpendapat sedemikian, HMT membenarkan perintah-perintah yang dipohon dalam SP terpinda dan injuksi *Fortuna*, khususnya kerana hutang penghakiman telah dipersetujui dan bercagar, dan ini bermaksud perayu tidak layak mengeluarkan notis s. 218. Hakim Mahkamah Tinggi berpendapat jika perayu dibenarkan meneruskan petisyen penggulungan, ini
- F menjadikan perkataan 'to secure' dalam s. 218(2)(a) Akta tidak diperlukan dan lewah. Maka timbul rayuan-rayuan ini.

Diputuskan (membenarkan rayuan-rayuan)

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

- G (1) Notis tersebut sah dan boleh dikuatkuasakan. Menyentuh s. 218 Akta, dalam kapsyen tajuk dan kandungan notis tersebut, apabila peruntukan statutori lebih khusus dikenali sebagai 'Seksyen 218(2)(a) Akta Syarikat 1965', perayu telah memenuhi keperluan notis s. 218(2)(a) yang sah. Notis tersebut jelas digambarkan sebagai 'Tuntutan Statutori Bawah
- H Seksyen 218 Akta Syarikat 1965 (Akta 125) bagi Bayaran Hutang'. Notis ini memperihalkan keberhutangan responden terhadap pelbagai jumlah yang diperincikan. Hutang pelbagai jumlah juga diperolehi oleh perayu terhadap responden melalui tuntutan sivil. Ini menunjukkan hutang yang dinyatakan dalam notis adalah hutang penghakiman. Responden diberi
- I prasyarat 21 hari dari tarikh penyerahan notis untuk membayar jumlah yang dituntut. Perayu juga memaklumkan responden bahawa perayu

bersandar pada anggapan statutori dalam s. 218(2)(a) bahawa responden akan dianggap tidak mampu membayar hutangnya dan perayu boleh memulakan prosiding penggulangan terhadap responden.

- (2) Terdapat salah arah dalam prinsip injunksi *Fortuna* yang terpakai. Hakim Mahkamah Tinggi menerima bahawa hutang tersebut berasaskan hutang penghakiman tetapi bersetuju dengan responden bahawa hutang tersebut dalam pertikaian *bona fide* kerana hutang yang terhutang dan tertunggak pada perayu telah bercagar. Hutang tersebut tidak bercagar mahupun disetujui. Dengan itu, responden jelas tidak memenuhi prinsip pertama pemberian injunksi *Fortuna*. Persetujuan kontraktual hanya memberi perayu dua kausa tindakan bersalingan jika responden melanggar tanggungjawabnya membayar semula kemudahan kredit yang diperuntukkan oleh perayu. Kecuali terdapat persetujuan bertentangan, perayu berhak meneruskan kedua-dua atau kesemua remedi yang ada terhadap responden serentak, secara semasa atau berturut-turut untuk mendapatkan semula wang yang dipinjamkan. Responden gagal menunjukkan, bawah undang-undang dan berdasarkan fakta, petisyen-petisyen tersebut, jika dikemukakan, tiada peluang berjaya atau mungkin gagal. Sebaliknya, perayu berjaya menunjukkan ia mempunyai peluang untuk berjaya.

Case(s) referred to:

Bina Satu Sdn Bhd v. Tan Construction [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 HC (refd)

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC (refd)

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation [1978] VR 83 (refd)

Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd [1992] 1 LNS 26 HC (refd)

Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA (refd)

Mann v. Goldstein [1968] 2 All ER 769 (refd)

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA (refd)

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA (refd)

Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 (refd)

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

For the appellant - Chan Kean Li & Lim Poh Leong; M/s Gibb & Co

For the respondent - T Gunaseelan & Keshvinjeet Singh; M/s Gunaseelan & Assocs

[Editor's note: *For the High Court judgment, please see Malaysia Pacific Corporation Bhd v. RHB Bank Bhd* [2016] 1 LNS 1781 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Mary Lim JCA:

Introduction

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[1] These two appeals by the same appellant are in relation to two applications made by the respondent in the court below for what is in essence, a *Fortuna* injunction (see *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83). The respondent was seeking to restrain the appellant from presenting a winding-up petition after the appellant's notice issued pursuant to s. 218 of the Companies Act 1965 failed to elicit payment by the respondent of monies ordered under a judgment dated 11 April 2016. Not only was the restraining order granted, the notice was also declared as invalid.

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[2] Upon proper consideration of the submissions, records of appeal and the applicable principles of law, we were unanimous in our decision to allow both the appeals. We found merit in the argument of learned counsel for the appellant and these are our reasons in full.

Undisputed Facts

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[3] On 11 April 2016, the appellant obtained a summary judgment against the respondent *vide* High Court Civil Suit No: 22NCC-397-11-2015. The civil suit relates to revolving credit facilities and overdraft facilities granted by the appellant to the respondent to which the respondent had defaulted in their repayments. The respondent's application to strike out the claim was dismissed whilst the appellant's application for summary judgment was allowed. The judgment sum was for over RM112,212,565.24 together with interest and costs (judgment sum). The respondent appealed. On 4 October 2016, this court dismissed the respondent's appeal.

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[4] The appellant commenced foreclosure proceedings in respect of the respondent's property situated at Lot 1203, Section 57, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan together with the building constructed on the property ("the subject property") which had been charged by the respondent to the appellant. On 10 August 2016, the High Court at Kuala Lumpur granted an order for sale of the subject property by way of a public auction. The respondent appealed. At the time of the hearing of the two applications before the High Court, the appeal had not been disposed. By the time of the hearing of the present appeals, this court had dismissed the respondent's appeal in respect of the foreclosure proceedings.

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[5] On 8 June 2016, the appellant issued a notice pursuant to s. 218(2)(a) of the Companies Act 1965 seeking payment of the judgment sum (“s. 218 notice”). The respondent filed an originating summons (amended originating summons – encl. 14) challenging the validity and enforceability of the s. 218 notice and seeking in addition, an injunction restraining the appellant from presenting a winding-up petition based on that s. 218 notice. By application in encl. 7, the respondent sought an interim *Fortuna* injunction. This application was granted on an *ex parte* basis on 14 June 2016. On 18 September 2016, both this application and encl. 14 were heard *inter partes*.

The Contentions In The Amended Originating Summons

[6] The respondent claimed that the s. 218 notice is oppressive and an abuse of process because of the peculiar circumstances in the case. First and foremost, the respondent is a public listed company. It is listed on the Bursa Stock Exchange. The respondent is undergoing restructuring and such action is with Bursa’s approval. Next, pending the hearing of the foreclosure proceedings, the respondent had suggested to the appellant that the subject property be sold to a third party, Terra Pontus Ltd, a Singaporean company, proposed by the respondent for RM250 million, a sum which was obviously more than the judgment sum. The respondent claimed that with the sale, it would then be in the position to settle the judgment sum.

[7] The respondent further claimed that the s. 218 notice is void, a nullity and is ineffective because it is vague and ambiguous. The s. 218 notice failed to specify terms for compliance, whether payment has to be made or that the respondent has the option to secure or compound the debt in question. According to the respondent, the critical words in s. 218(2)(a) of the Companies Act 1965, that the respondent had “neglected to pay the sum” or “to secure or compound”, were missing in the s. 218 notice; and this omission rendered the notice void and ineffective.

[8] The respondent ran yet a further argument, and that is that the appellant was in fact not entitled to issue the s. 218 notice. Under s. 218(2)(a) of the Companies Act 1965, the appellant was entitled to have the debt compounded and secured. In this case, the debt, no doubt is the judgment sum, is already secured in the subject property the value whereof exceeded the judgment debt. That charge is valuable security in the hands of the appellant and it disentitled the appellant from issuing the s. 218 notice.

[9] Lastly, the respondent argued that it had offered to secure the judgment debt by getting Terra Pontus Ltd, to buy the subject property. At no time did the appellant intimate to the respondent that it objected to this sale or that this “offer to secure” was unacceptable or not to its reasonable satisfaction. The foreclosure proceedings already underway were therefore said to be akin to compounding the judgment debt.

- A [10] For all these reasons, the respondent argued that the appellant was not entitled to issue the s. 218 notice. According to the respondent, threatening to wind-up the respondent and taking foreclosure proceedings to recover the judgment debt in the circumstances described amount to an oppression.
- B [11] The appellant on the other hand, maintained that it was entitled to take the several courses of action. This was provided for under the contractual arrangements between the parties, that it had concurrent rights *in personam* and *ad rem*, and this has been acknowledged by the court – see *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81.
- C [12] As for the s. 218 notice, the appellant submitted that the respondent cannot possibly be said to have fulfilled the requisite conditions for the issue of a *Fortuna* injunction set down in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316; and followed in a long line of cases including *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947. Those conditions involved
- D establishing that the petition to wind-up the company has no chance of success and that the presentation will produce irreparable damage to the company. Since the s. 218 notice not only stems from but is based on the seeking of payment under a valid and enforceable judgment of the court, which judgment has not been stayed or set aside, the injunction cannot be
- E granted.
- [13] Relying on *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763, the respondent is also commercially insolvent as it has admitted that it is not ready, able and willing to satisfy the appellant's demand in the s. 218 notice and has instead directed the appellant
- F to realise the charge on the subject property. When a company is not able to meet the debts as they become due, the company is commercially insolvent for the purposes of s. 218 of the Companies Act 1965.

Decision Of The High Court

- G [14] On the issue of the validity of the s. 218 notice, the learned judge disagreed with the respondent finding the notice not at all void or a nullity for the following reasons.
- [15] First, the learned judge accepts that it is an undisputed fact that the appellant had obtained a valid and enforceable judgment against the
- H respondent on 11 April 2016. Although certain words complained of were not in the s. 218 notice, the learned judge found from a reading of the whole notice that the respondent had been given the requisite 21 days from the date of service of the notice to pay the sum demanded. The learned judge further found that where there is a failure to pay the sum demanded, under

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s. 218(2)(a) of the Companies Act 1965, the respondent is deemed unable to pay its debt. Thereafter, winding-up proceedings may properly be commenced against the respondent.

[16] Second, in the complaint that the notice fails to state the right of the respondent to secure or compound the sum to the reasonable satisfaction of the appellant, the notice is nevertheless effective in relation to raising a presumption under s. 218(2)(a). Applying *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 1 LNS 26; [1992] 2 MLJ 370, it was clear from the terms of the notice that it was a s. 218(2)(a) notice; suffice that the respondent was given three weeks to meet the demand.

[17] Despite so finding, the learned judge nevertheless granted the orders sought in the amended originating summons and the *Fortuna* injunction, principally on the basis that the judgment debt is compounded and secured. The learned judge accepted and agreed with the respondent's argument that the debt was compounded or secured; and that where the judgment debt is secured, the appellant is not entitled to issue the s. 218 notice. In the learned judge's understanding:

The word "**compound**" means "Settle by mutual concession; to compound a debt, is to abate a part on receiving the residue. *Haskins v. Newcomb* 2 Johns 408; *Pencil v. Rhodes* 9 QB 129" – *Words, Phrases & Maxims (Legally & Judicially Defined* by Anandan Krishnan at page 776." The word "**to secure**" means "to guarantee or make safe against loss, and are not a synonym for the words "to obtain" or "to procure", *Re Smith* [1952] OR 135, at 147 Ont CA, per Hogg JA. The plaintiff refers to *Words and Phrases Legally Defined* Fourth Edition under the General Editorship of David Hay (Volume 2: L-Z)". The word "**security**" has been defined as A "security", generally speaking, is anything that makes the money more assured in its payment or more readily recoverable, as distinguished from e.g. a mere I.O.U. which is only evidence of a debt. See SECURITIES. See Further, per Stirling *Li British Oil Mills Co v. Inland Revenue Commissioners* [1903] 1 KB 697.

(emphasis added)

[18] Although the learned judge found that the appellant was entitled to recover monies simultaneously through foreclosure proceedings, it has to be seen in context. That context being that there was already a charge or security in hand as "valuable security". Even then, the security's worth far exceeded the judgment debt of RM118,164,679.86. According to Her Ladyship, by proceeding with the foreclosure proceedings, the appellant was "admitting that the debt is secured and is realising the security to settle the debt and this is akin to compounding the debt". It was the view of the learned judge that if the appellant was allowed to proceed with the winding-up petition, it would render the word "to secure" in s. 218(2)(a) of the Companies Act 1965 "superfluous or otiose". The declaratory orders and the injunction were consequently granted in the interest of justice to prevent abuse of process.

A Decision Of This Court

[19] The same submissions were articulated before us – see written submissions filed by both parties. Having had the opportunity to consider the written grounds of decision, with respect to the learned judge, we found ourselves most constrained to disagree with the learned judge’s consideration of the principles applicable in an application for a *Fortuna* injunction.

[20] But first, we shall deal with the matter of the s. 218 notice. We agree with Her Ladyship that the notice is valid and enforceable. There is no appeal or cross-appeal on this finding. In alluding to s. 218 of the Companies Act 1965 both in its title caption and in the body of the notice itself where the statutory provision is more specifically identified as “s. 218(2)(a) of the Companies Act 1965”, the appellant has satisfied the requirements for a valid s. 218(2)(a) notice. The notice, quite clearly, describes itself as a “statutory demand pursuant to s. 218 of the Companies Act 1965 (Act 125) for payment of a debt”. It alludes to the respondent’s indebtedness for the various sums detailed. The debt for the various sums was obtained by the appellant against the respondent *vide* “High Court Civil Suit No. 22NCC-397-11-2015 where on execution has not been stayed”. This shows that the debt stipulated in the notice is a judgment debt. It is true that the summary judgment was not stayed and the High Court’s decision was later affirmed by this court on 4 October 2016.

[21] Furthermore, the respondent was given the requisite twenty-one days from the date of the service of the notice to pay the sum demanded. The appellant has also alerted the respondent that it, the appellant, claims reliance on the statutory presumption in s. 218(2)(a), that the respondent would be deemed unable to pay its debt and thereafter the appellant may commence winding-up proceedings against the respondent. As propounded in *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 1 LNS 26; [1992] 2 MLJ 370, so long as the two limbs in s. 218(2)(a) of the Companies Act 1965 are met, the notice would be valid and the statutory presumption of insolvency may be relied on. The two limbs being the proper service of the notice and the provision of time to meet the demand in the notice:

In my judgment, s. 218(2)(a) has to be read as having two limbs, the first of which prescribes what the creditor has to do to invoke the presumption. What the creditor has to do is to serve on the company by leaving at its registered office a demand under his hand or under the hand of his authorised agent requiring the company to pay the sum then due. The second limb prescribes that the debtor company has three weeks within which to pay the sum or to secure or compound for it. Since what the debtor company can do is statutorily prescribed, there is no call for the creditor to spell out what the law prescribes. It is sufficient that it is clear from the contents of the letter of demand that it is a s. 218(2)(a) notice which clarity can be achieved, *inter alia*, by a reference in the letter to the

subsection and by the letter giving the debtor three weeks to meet the demand. The effect of the debtor company not complying with one or the other of the three courses open to it as prescribed by the second limb of the sub-section need not be spelled out in the letter.

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[22] As for the matter of the *Fortuna* injunction, although the learned judge started out correctly by referring to the leading authority on this remedy, there is a misdirection on the principles that are applicable. In *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* (*supra*), this court had opined that the court has jurisdiction and power to grant what it then described as “an anti-suit injunction whenever the interests of justice call for or demand it”; and that the court has power to issue injunctions restraining the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. It is true that this court gave another example where it may be in the interest of justice that “a party may be restrained from presenting a winding-up petition if it is found, for example, that there is a *bona fide* dispute about the debt on which the notice of demand issued under s. 218 of the Companies Act 1965 is based. See, *Bina Satu Sdn Bhd v. Tan Construction* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384; [1988] 1 MLJ 533; *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576. Once the debt on which the proposed petition is based is *bona fide* disputed it matters not that the debtor company is in fact insolvent. See, *Mann v. Goldstein* [1968] 2 All ER 769.

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[23] In fact, in *Mobikom* itself the injunction was to restrain the presentation of a winding-up petition based on a s. 218 notice demanding payment of an arbitral award. The parties had referred their dispute to arbitration, as was agreed under their underlying contractual arrangements. However, pending the hearing of the plaintiff’s application to set aside the award, the defendant presented a petition to wind-up the plaintiff.

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[24] The observations of this court in *Mobikom* must be understood to have been made in that context, that once a debt on which a petition is based is *bona fide* disputed, it matters not that the debtor company is in fact insolvent. In our view, where the debt is disputed, it would be in the interest of justice that an injunction be granted. A debt may be said to be in *bona fide* dispute where the award upon which the debt arises is challenged. Since the challenge, which is permitted under the Arbitration Act 2005, was already pending in court at the material time, the presentation of the winding-up petition in those circumstances ought to be restrained.

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[25] In the instant appeal, the learned judge accepted that the debt was founded on a judgment debt. Despite this, the learned judge agreed with the respondent that the debt is in *bona fide* dispute because the debt due and owing to the appellant “is secured” – see para. 8.2 of the grounds. The learned judge considered the “valuable security in the form of the plaintiff’s property which is worth around RM250,000,000, which far exceeds the

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- A judgment sum” and which the appellant “already holds”, meant that the debt was already secured. Consequently, the appellant “is not entitled to issue a notice under s. 218 of the CA.” It was the view of the learned judge that if the appellant was “allowed to proceed with the winding-up petition, it would render the word “to secure” in the s. 218(2)(a) of the CA superfluous or otiose ...” Although Her Ladyship agreed with the appellant that the appellant was entitled to recover the monies owed simultaneously through foreclosure proceedings, “it has to be seen in the context that the defendant has in their hand a security worth in excess of the amount owed by the plaintiff. Further by proceeding with the foreclosure proceedings, the defendant is admitting that the debt is secured and is realising the security to settle the debt and this is akin to compounding the debt ...”

- [26] With respect to the learned judge, the debt was neither secured nor compounded. The contractual arrangements merely gave the appellant in this case, two corresponding causes of action in the event the respondent breached its obligations to repay the credit facilities provided by the appellant. Unless there was an agreement to the contrary, the appellant was entitled to pursue both or all remedies available against the respondent borrower “simultaneously, contemporaneously or successively to recover the monies lent ...” – see *Chan Boi Loi v. Public Bank Bhd (supra)*.

- [27] At the material time, the charge was created over the subject property in order to secure the credit facilities. It could not have been created to secure any debt, certainly not in the sense envisaged under s. 218(2)(a) of the Companies Act 1965 as none was in existence at the time the charge was created and registered. Until and unless the respondent breached its obligations to repay the appellant, there was no debt to secure, and the appellant would not be entitled to foreclose on the subject property. However, the moment the respondent is in breach, the appellant has a right to sue *in personam* to recover the monies due while the charge gives the appellant a right *ad rem* to foreclose on the charged property.

- [28] Therefore, foreclosing on the subject property does not and cannot be said to amount to realising the security to the debt within the purpose and intent of s. 218(2)(a) such as to turn the judgment debt into a disputed debt. The reading and construction given by the learned judge to the presence of the charge, that it is “valuable security” that disentitled the appellant from issuing a notice under s. 218 of the Companies Act 1965 was clearly erroneous. Such reading and construction meant that the contractual terms that the appellant was entitled to pursue all remedies “simultaneously, contemporaneously or successively to recover the monies lent ...” as recognised by the Federal Court in *Chan Boi Loi v. Public Bank Bhd (supra)* would be rendered meaningless and of no effect. It would mean that the appellant would have to enforce its rights to recover the facilities afforded

to the respondent either one at a time or pursue certain actions first before pursuing other remedies. And, even then, the appellant would only be able to contemplate initiating winding-up proceedings where there is still balance due of the judgment debt to be settled. Such a reading runs counter to both settled principles and to the terms of the contract, and in neither case is this court in the position to change nor are we so inclined.

[29] Such a construction and conclusion as reached by the learned judge also runs contrary to another settled principle, that winding-up proceedings are not enforcement or execution proceedings, though in this case, they may appear to be part of the appellant's efforts to enforce the summary judgment.

[30] In respect of the *Fortuna* injunction, we agree with the submissions of the appellant that the conditions for the grant of such an injunction were not met on the facts and in law. The two requisite conditions or principles as laid down in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd (supra)* and reiterated by this court in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy (supra)* are described as follows:

[26] The first principle laid down in that case is that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting an injunction under this principle, the applicant must satisfy both limbs of the principles, ie:

- (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
- (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25)

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case cannot be granted by court under this principle.

[28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

- A [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not (*sic*) consequence whether or not it will cause irreparable damage to the company, if presented. **A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt.**
- B The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

(emphasis added)

- C [31] We agree with the above propositions. As we shall soon see, even the first principle is not met, whether on the law or on the facts and consequently, the orders ought not to have been granted by the learned judge. The first principle requires an examination of the debt itself, whether it is disputed or otherwise.

- D [32] As recognised by the learned judge, the s. 218 notice issued here is based on the judgment debt. The debt arises from and is the judgment debt which was already affirmed by this court at the material time of the consideration of the application for a *Fortuna* injunction. This judgment debt is valid and enforceable. Such a judgment debt is an undisputed debt.

- E [33] Where this undisputed debt is not paid by the respondent within the time prescribed, the appellant is entitled to rely on the presumption under s. 218(2)(a) that the respondent is deemed unable to pay its debt as and when it falls due. In other words, the respondent is deemed insolvent. A company which is insolvent may be wound-up on such grounds upon the presentation of a winding-up petition – *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763.
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- G [34] In this appeal, the respondent is admittedly unable to pay the judgment debt. This can be readily inferred from the respondent's explanation that it can only pay the judgment debt upon the sale of the subject property to Terra Pontus Ltd. With such admission, over and above the presumption in s. 218(2)(a), it is quite clear that the presentation of a winding-up petition under such conditions is not bound to fail, that the appellant has a good chance of success, both in law and on the facts. Under such circumstances, whether or not the intended petition causes irreparable damage is of no consequence.

- H [35] As explained earlier, the learned judge's treatment of the judgment debt as being secured or compounded was erroneous. Since the debt has not been secured, and more importantly since the debt is not disputed and cannot be considered as disputed in law or on the facts, it is therefore apparent that the respondent has not met the first principle for the grant of a *Fortuna*
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injunction. The respondent has clearly failed to show that in law and on the facts, the petition, if presented, has no chance of success and is bound to fail. On the contrary, the appellant has shown that it has every chance of success.

[36] While the learned judge has discretion on whether to prevent abuse of process and grant orders in the interest of justice, such exercise must be made according to judicial and guiding principles as propounded either in statute law or case law. In this case, the applicable principles are the two principles enunciated in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd (supra)* and followed in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy*. As opined in *Pacific & Orient Insurance Co Bhd*, the right of the appellant to initiate winding-up proceedings is a substantive right and enforcing such a right by issuing a s. 218 notice as was done in the present appeals, cannot amount to an abuse of court process. We further agree with the view expressed in *Pacific & Orient Insurance Co Bhd* that “Neither procedural nor inherent jurisdiction of the court can deprive the respondent (appellant in these appeals) of that right.” With respect, the learned judge has clearly misdirected herself on those principles and consequently has wrongly exercised her discretion.

[37] For these reasons, the appeals must be and are hereby allowed. The orders of the High Court are set aside and the applications in encls. 7 and 14 must stand dismissed.

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